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Supreme Court of the United States

OCTOBER TERM, 1944

No. 593

RADIO STATION WOW, INC. (a Nebraska corporation), WOODMEN OF THE WORLD LIFE INSURANCE SOCIETY (a Nebraska corporation), DE E. BRADSHAW, T. E. PATTERSON, FARRAR NEWBERRY, WILLIAM RUESS, W. C. BRADEN, R. E. MILLER, STERLING C. HOLSTON and JOHN J. GILLIN, JR.,

Petitioners,

v.

HOMER H. JOHNSON,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEBRASKA

FRANCIS P. MATTHEWS,
RAINEY T. WELLS,
MONROE OPPENHEIMER,
ROBERT E. SHER,
RAYMOND M. CROSSMAN,
EARL CLINE,
ROBERT W. DEVOE,
C. PETRUS PETERSON,
PAUL P. MASSEY,
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Counsel for Petitioners.

COCKLE PRINTING COMPANY, LAW BRIEFS, OMAHA

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Petitioners,

v.

HOMER H. JOHNSON,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEBRASKA

To the Hon. Harlan Fiske Stone, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your petitioners respectfully show:

A.

SUMMARY STATEMENT OF THE MATTER INVOLVED

This is a petition for a Writ of Certiorari to review the judgment of the Supreme Court of Nebraska entered March 10, 1944, reversing the judgment of the District Court of Douglas County, Nebraska, in favor of petitioners and against respondent (R. 744) and the judgments entered May 26, 1944, denying rehearing (R. 794) and overruling the petitioners' motions to dismiss the action for lack of jurisdiction over the subject matter (R. 793). The decision below was by a divided court, four members voting in favor of reversal and three voting in favor of affirming the decision of the District Court (R. 761).

B.

JURISDICTION

The judgments of the Supreme Court of Nebraska, on rehearing, and overruling the motions to dismiss for lack of jurisdiction, were entered May 26, 1944, and its mandate stayed pending determination of this petition (R. 801, 803). By order of Associate Justice Robert H. Jackson dated July 28, 1944, the time for filing this petition was extended to and including October 24, 1944 (R. 813).

The jurisdiction of this Court is invoked under Sec. 237 (b) of the Judicial Code, as amended by the Act of February 13, 1925, on the ground that the decision below denied a title, right, privilege and immunity claimed

by petitioners under the Communications Act of 1934, particularly Sections 310 (b) and 402 (a) thereof. The authorities relied on to sustain such jurisdiction are *Texas & Pac Ry. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 51 L. Ed. 553, 27 S. Ct. 350, and *Lewis-Simas-Jones Co. v. So. Pac. Co.*, 283 U. S. 654, 75 L. Ed. 1333, 51 S. Ct. 592, and other cases cited in Part B of the supporting brief (pp. 18-21). The statement below that the jurisdictional issue had been "disclaimed" is not supported by the record or by the decisions of this Court. See discussion in Part B of the supporting brief (pp. 20-21).

C.

QUESTIONS PRESENTED

1. Whether the primary jurisdiction doctrine, applied to Section 310 (b) of the Communications Act of 1934, precludes the courts, in private litigation, from passing on the reasonableness or validity of transfers of radio broadcasting stations, until after consideration thereof has been given and decision rendered thereon by the Federal Communications Commission from the standpoint of the public interest.

2. Whether, in any event, jurisdiction over a suit to set aside, modify or review an assignment of a radio station license, and a lease of the station facilities, approved by the Commission, can be exercised by a state court or is restricted to the federal courts under Section 402 (a) of the Communications Act of 1934.

3. Whether, in this particular case, the judgments of the Supreme Court of Nebraska invaded the exclusive jurisdiction vested in the Federal Communications Commission under the provisions of the

Communications Act of 1934, and amendments thereto, by annulling in legal effect the orders of the Commission of December 15, 1942, and January 12, 1943.

4. If 3 is answered in the affirmative, whether the judgments of the Supreme Court of Nebraska deprived the petitioners of rights, titles, privileges, and immunities set up and claimed under a statute of the United States (Communications Act of 1934) and deprived them of their property without due process of law in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

5. Whether, aside from the jurisdictional issues, the decisions below were contrary to the decisions of the Supreme Court of the United States, construing the Communications Act of 1934, by attributing valuable property interests to a radio station license in violation of the provisions of Sections 301 and 309 (b).

D.

MATERIAL FACTS AND PROCEEDINGS BEFORE THE COMMUNICATIONS COMMISSION AND THE COURTS BELOW

This case presents a conflict between the authority and jurisdiction of the Federal Communications Commission and the United States District Courts, under the Communications Act of 1934, and the authority and jurisdiction of the Nebraska State Courts, with respect to the validity of assignments of radio station licenses, and the transfers of the physical facilities covered by such licenses.

(1) **The parties.** The respondent, Homer H. Johnson (plaintiff and appellant below), a certificate holder in Woodmen of the World Life Insurance Society, insti-

tuted this action on behalf of himself and all other certificate holders.

The petitioner, Woodmen of the World Life Insurance Society (defendant and appellee below), is a fraternal benefit society (R. 39, 40, Ex. 1, R. 41) having approximately 336,000 members, $136,000,000 of assets and $367,000,000 of insurance in force (R. 11, 59).

The individual petitioners (defendants and appellees below), except Gillin, are executive officers and directors of the Society, resident in Nebraska (R. 1, 60).

The petitioner, Radio Station WOW, Inc., (defendant and appellee below) is a Nebraska corporation (R. 1, 148) and the petitioner John J. Gillin, Jr. (defendant and appellee below), is its President and General Manager (R. 141, Ex. 12, R. 148, 157).

(2) **Nature of action.** This suit was instituted to declare illegal and void and to cancel and terminate an assignment by Woodmen of the World Life Insurance Society to Radio Station WOW, Inc., of the license to operate the broadcasting facilities of Radio Station WOW, together with the lease executed by said Society of the facilities used in the exercise of the assigned license. The petition referred to proceedings pending before the Commission and alleged (a) lack of power in the board of directors of the Society to make the assignment and lease; (b) a scheme by the directors to enrich themselves by gaining control of the station "for a grossly inadequate consideration"; (c) that "no reasons have been disclosed for the leasing of the radio station other than set forth" in the application filed with

the Federal Communications Commission, which reasons "are obviously insufficient" (R. 6); (d) that the lease was "for a grossly inadequate rental and to a lessee without adequate financial responsibility" (R. 6); and (e) that the "purpose of the leasing of the station, as aforesaid, is to make the radio station available to the Consumers Public Power District and those interested in its acquiring * * * power facilities for spreading propaganda favoring such sale" (R. 9).

(3) **Proceedings before Commission.** On October 3, 1942, the Society entered into a 15-year lease of its radio station WOW at Omaha, Nebraska, constructed at a cost of approximately $175,000 (R. 581), to Radio Station WOW, Inc., at an average annual rental of approximately $74,000 (R. 756). The lease covered all of the lessor's radio buildings, equipment, and apparatus,[1] together with its contracts with the National Broadcasting Company and others "with reference to broadcasting commercial or other programs."[2]

This lease specifically provided:

> "This lease is to become effective and the term thereof shall commence as and when the Federal Communications Commission grants to the party of

1 The applicable language of paragraph 1 of the lease is as follows: "* * * all of the buildings, radio towers, electric plant, equipment and radio transmission facilities erected thereon, and all machinery, instruments, contrivances, apparatus, equipment, devices, tools and materials, consisting in part of transmitter and receiving equipment, control panels, transcribing equipment, microphones, grand pianos, electric organ, celesta, sound equipment, transmission, transcription equipment, electric fixtures, music library, motors, engine, loud speakers, radio receiving sets, cameras, mobile units and transmitter thereon, two supply units, portable transcribing equipment and all desks, tables, chairs, stands, filing cabinets and the household and personal property in the transmitter buildings, a more detailed description of which has been set forth in an inventory initialed by the parties hereto * * *." (R. 21, 22)

2 R. 22.

the second party a license to operate said ration station."[3]

The license was not in any manner included in the consideration for the lease and no other reference is made in the lease to the license.

On October 7, 1942, the lessor and lessee filed a joint application with the Federal Communications Commission for its consent to the assignment of the broadcasting license. The application, in accordance with the Commission's rules,[4] was accompanied by a copy of the lease contract and set forth the following data with regard to the finances of lessor and lessee, to justify and explain the proposed assignment: Complete inventory of station property; income statement of assignor; balance sheet of assignor (R. 386); the capital stock structure of the lessee by par value, voting power, number of shares issued and outstanding; the names and addresses of the lessee's incorporators, directors and officers (R. 394); the number and class of shares and percentage of issued stock owned or controlled by each stockholder in lessee; the beneficial ownership of such stock (R. 395); a balance sheet of the assignee corporation (R. 406).

On November 23, 1942, while the above application was pending before the Communications Commission, respondent instituted this action (R. 1) and alleged in his petition the pendency of said application before the Commission (R. 6).

On December 15, 1942, the Communications Commission, after receipt and consideration of the foregoing,

3 Paragraph 2 of Lease (R. 23).

4 Rules and Regulations, Federal Communications Commission, Sec. 1.364.

granted its consent in writing to the assignment. Under its terms "the consent of the Federal Communications Commission is hereby granted to the assignment of station license No. B4-S-686, dated 11-6-42 authorizing operation of the transmitting apparatus located at * * * 56th and Kansas Avenue, Omaha, Nebraska, from Woodmen of the World Life Insurance Society to Radio Station WOW, Inc. * * *" (R. 661, Ex. 32, R. 662A). The order of the Commission provided further that "The Commission's consent to said assignment is based on the representations made by the assignor and/or assignee that the statements contained in, or made in connection with, the application are true and that the undertakings of the parties upon which this assignment is authorized will be carried out in good faith * * *."

On January 5, 1943, the Society and Radio Station WOW, Inc., filed a joint application with the Federal Communications Commission with copies of all pleadings in this action, as of that date, and prayed that the Commission enter an order extending the time within which their contract might be consummated and postponing the effective date of the previous order of December 15, 1942, until final adjudication of this action which was then pending in the District Court of Douglas County, Nebraska (R. 665, 666, Ex. 33, R. 667).

Respondent, however, even after such joint application was filed, failed to take any steps to intervene in the proceedings before the Commission. Thereafter, on January 12, 1943, the Commission entered an order denying this joint application (R. 663, Ex. 34, R. 664). This

made effective the assignment and lease between the parties (R. 21, 23, Ex. 13, R. 163).

In this action Radio Station WOW, Inc., and Gillin moved to strike from the plaintiff's petition a part of Paragraph 9, upon the ground, inter alia:

> "* * * *that the granting or denying of an application to transfer or assign a radio station broadcasting license is a matter exclusively within the jurisdiction of the Federal Communications Commission.*" (R. 785)

This motion was overruled by the Trial Court (R. 791) and Radio Station WOW, Inc., and Gillin thereupon filed an answer denying the allegations of any fraud; denying any connection between the two corporations; alleging the adequacy of the lease considerations; and joining issues with the respondent (R. 28). In said answer it was alleged in Paragraph IX(c) (R. 31) that Radio Station WOW, Inc., has been since January 14, 1943, and is now:

> "* * * in possession of and operating the broadcasting station under and by virtue of the lease hereinbefore referred to and orders of the Federal Communications Commission."

The other petitioners filed an answer and denied the inadequacy of the consideration and any fraud; alleged the adequacy of the lease considerations; and joined issues with the respondent (R. 11).

(4) **Grounds for decision below.** At the close of the trial in the District Court, the trial judge stated:

> "I do not think there is any fraud here: there isn't any evidence of any fraud." (R. 730)

Thereupon, judgment was entered dismissing the action (R. 735) from which respondent appealed to the Supreme Court of Nebraska (R. 740).

The Supreme Court of Nebraska found unanimously that there was *no actual fraud* by the officers and directors of the Society, and *that no officer or director would gain directly or indirectly* from the assignment of the license and lease of the station facilities. Four judges, however, held that the transaction should be set aside because of certain features of the arrangement which the Court regarded as constituting "legal or constructive fraud." Briefly summarized, the grounds of decision were: (a) that the lease was not "a good deal for the Society, because only $74,000 a year was being received from the assignee of the radio license;" (b) that the assignor's president "because of his close friendship for Gillin," the station manager, admittedly responsible for its success, "prompted the organization" of the assignee corporation by Gillin and his friends; (c) that "Gillin obtained a one-fourth interest in this 15-year lease * * * for a nominal investment and in addition thereto, in effect, a $25,000 bonus * * * ;" (d) that the Society in return "obtained an extremely excessive reduction in its income * * * and a lease the terms of which are grossly inadequate to protect it * * *," and (e) that there was "little security back of" the lease and assignment because of the capital stock structure of the assignee corporation (R. 745).

The judgment of the Supreme Court of Nebraska, entered March 10, 1944, directed inter alia that:

"The lease to the station, the lease to the space occupied by the station, and the transfer of the license to operate the station be vacated and set aside."

and:

"That the license to operate the station be returned and that lessee be directed to do all things necessary for that purpose; that generally everything be done to restore the parties to their original position prior to entering into the lease: * * *" (R. 744)

When the jurisdiction and power of the Federal Communications Commission were invaded in this action by the judgment and opinion of the Supreme Court of Nebraska, entered March 10, 1944, the petitioners filed in the Supreme Court of Nebraska on March 30, 1944, motions to dismiss the action challenging the state court's jurisdiction and asserting exclusive jurisdiction in the Federal Courts and the Federal Communications Commission (R. 775, R. 782).

These motions were overruled on May 26, 1944 (R. 793).

The petitioners also filed on March 30, 1944, motions for rehearing in the Supreme Court of Nebraska, reasserting that exclusive jurisdiction was vested in the Federal Courts and Federal Communications Commission (R. 769, R. 778). On May 26, 1944, these motions were overruled, rehearing denied, and judgment and opinion of March 10, 1944, adhered to (R. 794).

In its opinion on rehearing, the Court conceded that the power "to license a radio station, or to transfer, assign or annul such a license, is within the exclusive

jurisdiction of the Federal Communications Commission" (R. 794). The Court insisted, however, that such jurisdiction "does not deprive the state courts of jurisdiction to hear and decide all other property rights in a radio station and the rights of parties incident thereto," that "the effect of our former opinion was to vacate the lease of the radio station and to order a return of the property to its former status, the question of the Federal license being a question solely for the Federal Communications Commission" and "the fact that the property involved was used in a licensed business was an incident to the suit only" (R. 794).

E.

REASONS FOR GRANTING THE WRIT

(1) The court below cancelled a radio station lease which had been found unobjectionable and had been approved by the Federal Communications Commission. Its theory was that the decree affected merely private "property rights in a radio station," and "the fact that the property involved was used in a licensed business was an incident to the suit only" (R. 794). In so holding, the court invaded the jurisdiction of the Federal Communications Commission and of the Federal Courts under the provisions of the Communications Act of 1934.

(2) The court, under the guise of a finding of constructive fraud, decided issues of public as well as private concern, over which the Communications Commission was vested by Congress with primary jurisdiction. It condemned as inadequate the very financial and managerial arrangements, and lease terms, found unobjection-

able by the Federal Communications Commission when it consented to the assignment.

(3) The primary jurisdiction doctrine applies to the functions of the Federal Communications Commission. It was the function and duty of the Federal Communications Commission to pass on the desirability, in the public interest, of the very elements of the lease and assignment condemned by the Nebraska Supreme Court as contrary to the private interests of the lessor. Respondent's remedy was to intervene before the Federal Communications Commission, and if dissatisfied with its ruling, institute an action before a special three-judge Federal Court under Section 402 (a) of the Act.

(4) Under Sections 301 and 309 (b) of the Act. radio channels are public property and incapable of private ownership. The decisions below, by attributing a private property value to the station license, are inconsistent with said sections and the decisions of this Court.

(5) The decisions below cannot be sustained as involving purely non-federal questions, and the court below assumed that federal questions were involved and decided them.

(6) The questions are of importance and substance. They involve nothing less than the power of the Federal Communications Commission effectively to control the transfer of radio stations. The rulings below, if allowed to stand, will encourage a multiplicity of suits and result in conflicting court decisions in a field where the public interest demands uniformity of administration through a single federal commission. The danger of such

litigation is accentuated by the keen competition caused by wartime restrictions on new equipment, as well as by the newly developed techniques of Frequency Modulation and Television.[5]

WHEREFORE, your petitioners pray that a Writ of Certiorari be granted under the seal of this Court directed to the Supreme Court of Nebraska, to the end that this cause may be reviewed and determined by this Court as provided for by the Statutes of the United States; and for such further relief as to this Court may seem proper.

Dated this 11th day of October, 1944.

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5 "Frequency Modulation," "Radionics, January, 1944"; "The People's Stake in Radio," The New Republic, July 3, 1944, pp. 11 et seq.; Hearings before the Committee on Interstate Commerce (78th Cong. 1st Sess.) on S. 814, pp. 669 et seq.

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Supreme Court of the United States

October Term, 1944

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Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEBRASKA

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

A.

OPINIONS BELOW

The judgment of the District Court of Douglas County, Nebraska (R. 735) is unreported. The majority opinion of the Supreme Court of Nebraska of March 10, 1944, is reported in 13 N. W. (2d) 556, and the minority opinion at page 564. The opinion of May 26, 1944, denying the motion for rehearing is reported in 14 N. W. (2d) 666.

B.

JURISDICTION

In addition to the statements and citations contained in the petition (supra) it is contended that the Supreme Court of the United States has jurisdiction to review the judgments in this case because:

1. The judgment of the Supreme Court of Nebraska entered March 10, 1944 (R. 744) as adhered to by the Court in its judgment of May 26, 1944, overruling the motions for rehearing (R. 794) and the order entered on the same day overruling the motions to dismiss the action (R. 793) constitute a final judgment.

Dept. of Banking, State of Nebr. v. Pink, 317 U. S. 264, 87 L. Ed. 254, 63 S. Ct. 233.

Citizens Bank v. Opperman, 249 U. S. 448, 63 L. Ed. 701, 39 S. Ct. 330.

2. The judgment of the Supreme Court of Nebraska reversed the judgment of the District Court of Douglas County with directions, but leaving no

judicial discretion in the lower Court, and was therefore final in form, and thereby became reviewable by the Supreme Court of the United States without awaiting the formality of the ministerial entry of judgment upon the mandate by the lower Court.

Winthrop Iron Co. et al v. Meeker, et al, 109 U. S. 180, 27 L. Ed. 898, 3 S. Ct. 111.

Victor Talking Machine Co. v. George, 69 Fed. (2d) 871.

3. The judgments sought to be reviewed are by the highest Court of the State of Nebraska in which a decision could be had.

Art. V, Sec. 1, Const. of Nebr.

4. The Federal questions sought to be reviewed were properly raised and preserved in the Courts of Nebraska by:

(a) Motion and answer in the District Court and by motions to dismiss and for rehearing in the Supreme Court (R. 28, 785, R. 775, 782, 769, 778).

(b) A federal question may be advanced for the first time in a motion for rehearing if the state court entertains the same. The Supreme Court of Nebraska assumed and conceded that Federal questions were involved, had been raised and presented by petitioners, and said Court considered and decided said questions (R. 794).

Cumberland Coal Co. v. Board of Revision of Tax Assessments in Greene Co., 284 U. S. 23, 76 L. Ed. 146, 52 S. Ct. 48.

Great Northern Ry. Co. v. Sunburst Oil and Refining Co., 287 U. S. 358, 77 L. Ed. 360, 53 S. Ct. 145;

Illinois Cent. R. Co. v. Kentucky, 218 U. S. 551, 54 L. Ed. 1147, 31 S. Ct. 95.

Mallett et al v. No. Carolina, 181 U. S. 589, 45 L. Ed. 1015, 21 S. Ct. 730.

McKay v. Kalyton, 204 U. S. 458, 463, 51 L. Ed. 566, 569, 27 S. Ct. 346.

Grannis v. Ordean et al, 234 U. S. 385, 392, 58 L. Ed. 1363, 1368, 34 S. Ct. 779.

5. The decision below denied a title, right, privilege or immunity claimed by petitioners under Sections 310 (b) and 402 (a) of the Communications Act of 1934.

6. The judgment of the Supreme Court of Nebraska does not rest upon a non-federal ground which independently and adequately supports its judgments (R. 744, R. 794). The Supreme Court of the United States has jurisdiction to review a decision of a state court involving both a federal and non-federal ground where the non-federal ground is so interwoven with the federal ground as not to be an independent matter, or is not of sufficient breadth to sustain the judgment without a decision of the other ground.

Abie State Bank v. Charles W. Bryan, Governor, et al, 282 U. S. 765, 75 L. Ed. 690, 51 S. Ct. 252.

State Tax Commission of Utah, et al, v. W. Q. VanCott, 306 U. S. 511, 83 L. Ed. 950, 59 S. Ct. 605.

Chicago, Burlington & Quincy Railway Co. v. People of the State of Illinois, ex rel, 200 U. S. 561, 50 L. Ed. 596, 26 S. Ct. 341.

Atlantic Coast Line Railroad Co. v. J. H. Wharton et al, 207 U. S. 328, 52 L. Ed. 230, 28 S. Ct. 121.

7. The statement below that the issue of jurisdiction was "disclaimed" is not supported by the rec-

ord. The pleading relied on as such disclaimer was filed only by the Woodmen of the World Life Insurance Society, its officers and directors (R. 11, 21). Petitioners Radio Station WOW, Inc., and John J. Gillin, Jr., raised the jurisdictional question *in limine* by motion to strike (R. 785). They preserved their objections thereafter, by Paragraph IX (c) of their answer in the District Court (R. 31), and by their motion to dismiss (R. 782) and motion for rehearing (R. 778) in the Nebraska Supreme Court. *The issue being one of jurisdiction was not subject to waiver.*

United States et al v. Corrick et al, 298 U. S. 435, 80 L. Ed. 1263, 56 S. Ct. 829.

United States et al v. Griffin et al, 303 U. S. 226, 82 L. Ed. 764, 58 S. Ct. 601.

Davis, Director General of Railroads, etc. v. Wechsler, 263 U. S. 22, 68 L. Ed. 143, 44 S. Ct. 13.

City of Gainesville v. Brown-Crummer Investment Co. et al, 277 U. S. 54, 72 L. Ed. 781, 48 S. Ct. 459.

Mitchell, Insurance Commissioner v. Maurer, et al, 293 U. S. 237, 79 L. Ed. 338, 55 S. Ct. 162.

8. The question presented is one of substance and importance, as is more fully stated under Part G. of this brief (infra. pp. 26-42).

General American Tank Car Corp. v. El Dorado Terminal Co., 308 U. S. 422, 84 L. Ed. 361, 60 S. Ct. 325.

Armour & Co. v. Alton Railroad Co., 312 U. S. 195, 85 L. Ed. 771, 61 S. Ct. 498.

Venner v. Mich. Central RR. Co., 271 U. S. 127, 70 L. Ed. 868, 46 S. Ct. 444.

C.

STATUTES INVOLVED

Sections 310 (b) and 402 (a) of the Communications Act of 1934, as amended, provide:

> "310 (b) The station license required hereby, the frequencies authorized to be used by the licensee, and the rights therein granted shall not be transferred, assigned, or in any manner either voluntarily or involuntarily disposed of, or indirectly by transfer of control of any corporation holding such license, to any person, unless the Commission shall, after securing full information, decide that said transfer is in the public interest, and shall give its consent in writing.
>
> "402 (a) The provisions of the Act of October 22, 1913, c. 32, (38 Stat. 219), relating to the enforcing or setting aside of the orders of the Interstate Commerce Commission, are hereby made applicable to suits to enforce, enjoin, set aside, annul, or suspend any order of the Commission under this chapter (except any order of the Commission granting or refusing an application for a construction permit for a radio station, or for a radio station license, or for renewal of an existing radio station license, or for modification of an existing radio station license, or suspending a radio operator's license), and such suits are hereby authorized to be brought as provided in that Act."

Other applicable sections of said Act are set forth in Appendix A (infra, pp. 45-47).

D.

STATEMENT

A full statement of the case has been given under the heading "D" in the Petition, and to avoid duplication is not repeated (pp. 4-12, supra).

E.

SPECIFICATION OF ERRORS TO BE URGED

The Supreme Court of Nebraska erred:

(1) In holding that the issue of its jurisdiction over the subject matter of the suit could be, or had been, waived.

(2) In cancelling the lease of the radio station without the consent of the Federal Communications Commission first having been given to a reassignment of the license to operate the facilities covered by such lease.

(3) In nullifying, through such cancellation of the radio station lease, the order of the Federal Communications Commission which licensed the lessee alone to operate such station in the public interest.

(4) In construing the jurisdiction of the Federal Communications Commission under Sections 309 (b) (2) and 310 (b) as applying only to transfers of licenses rather than as also including authority over transfers of the instrumentalities, facilities, apparatus and services covered by the license.

(5) In its opinion of May 26, 1944 (R. 794), by holding " * * * The fact that the property involved was used in a licensed business was an incident to the suit only."

(6) In adjudicating, under the guise of a finding of constructive fraud, such issues as adequacy of consideration and financial responsibility of the licensee, the determination of which is vested primarily in the Federal Communications Commission.

(7) In failing to recognize the primary jurisdiction of the Federal Communications Commission to determine the validity of the transactions involved from the standpoint of the interest of the listening public in the larger and more effective use of radio.

(8) In failing, because of the foregoing, to dismiss the suit.

(9) In attempting to coerce Radio Station WOW, Inc,. to return the license to the Society by directing it "to do all things necessary for that purpose," thereby seeking to accomplish indirectly that which said Court conceded it did not have jurisdiction to order directly (R. 744, 745).

(10) In invading the jurisdiction of the courts of the United States vested in said courts under the provisions of the Federal Communications Act, particularly Sec. 402 (a) of Title 47, U. S. C. A.

(11) In depriving petitioners, through the foregoing, of the rights, privileges and immunities vested in them under the Communications Act of 1934, as well as of property without due process of law, in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

F.

SUMMARY OF ARGUMENT

I. The judgment sought to be reviewed was final, federal questions were properly raised and were decided by the court, and did not rest upon an independently and adequately supported non-federal ground.

II. The court, under the guise of a finding of constructive fraud, decided issues of public as well as private concern, over which the Communications Commission was vested by Congress with primary jurisdiction.

(a) The issues decided were of public as well as private concern.

(b) The primary jurisdiction doctrine applies to the Federal Communications Commission.

(c) Respondent had an adequate remedy before the Communications Commission and the United States Courts.

III. The order of the Commission could not be challenged except in the United States District Courts pursuant to Section 402 (a) of the Communications Act of 1934.

(a) A radio station license is not a mere incident to the facilities of a radio station.

(b) It is immaterial that the order of the Commission was permissive and not mandatory.

(c) The decision below can not be sustained as involving purely "non-federal" questions.

(d) Even in cases of actual fraud, the Federal Commnuications Commission must decide whether license cancellation is in the public interest.

IV. The decision was contrary to decisions of this court in attributing valuable property interests to a radio station license.

V. The case is of vital public importance.

G.

ARGUMENT

I.

The judgment sought to be reviewed was a final decision in a suit involving a case or controversy in the highest court of Nebraska in which a decision could be had, presented substantial federal questions properly raised, entertained, considered and decided by the Court, and did not rest upon an independently and adequately supported non-federal ground.

In *Winthrop Iron Co. et al v. Meeker et al*, 109 U. S. 180, 27 L. Ed. 898, 3 S. Ct. 111, the Court said:

> "The accounting ordered is only in aid of the execution of the decree, and is no part of the relief prayed for in the bill, which contemplated nothing more than rescission of the authority to execute the fraudulent lease, or a cancellation of the lease if executed; * * *. The litigation of the parties as to the merits of the case is terminated, and nothing now remains to be done but to carry what has been decreed into execution. Such a decree has always been held to be final for the purposes of an appeal."

In *Cumberland Coal Co. v. Board of Revision of Tax Assessments in Greene County, Pa.*, 284 U. S. 23, 76 L. Ed. 146, 52 S. Ct. 48, the Court said:

> "The presentation, by a petition for reargument in the highest court of a state, of a contention that a constitutional right has been violated, will, where such contention was considered and explicitly overruled by the state court, give the Supreme Court of the United States jurisdiction to review the judgment of the state court."

In *Great Northern Railway Company v. Sunburst Oil & Refining Co.*, 287 U. S. 358, 77 L. Ed. 360, 53 S. Ct. 145, the ruling announced by the Court is clearly stated in the syllabus:

> "The rule that a constitutional question first raised on motion for rehearing in a state appellate court comes too late to serve as a basis of review by the Supreme Court of the United States does not extend to cases where the constitutional question, however tardily raised, is considered and decided, or where the grounds of the decision supply a new and unexpected basis for a claim by the defeated party of the denial of a Federal right."

The Court in the case of *Abie State Bank v. Chas. W. Bryan, Gov'r et al*, 282 U. S. 765, 75 L. Ed. 690, 51 S. Ct. 252, stated:

> "The appellees insist that, reading together the syllabus and the text of the opinion (Old Colony Trust Co. v. Omaha, 230 U. S. 100, 116, 57 L. Ed. 1410, 1416, 33 S. Ct. 967), it appears that the supreme court, exercising its proper authority, made an independent finding as to the waiver or estoppel which the appellees had pleaded in defense. But the federal ground being present, it is incumbent upon this court, when it is urged that the decision of the state court rests upon a non-federal ground, to ascertain for itself, in order that constitutional guaranties may appropriately be enforced, whether the asserted non-federal ground independently and adequately supports the judgment."

In *Chicago, Burlington & Quincy Railway Co. v. People of the State of Illinois ex rel*, 200 U. S. 561, 50 L. Ed. 596, 26 S. Ct. 341, the Court said:

> "• • • the general rule is that where the judgment of the state court rests upon an independent, separate ground of local or general law, broad enough

or sufficient in itself to cover the essential issues and control the rights of the parties, however the Federal question raised on the record might be determined, this court will affirm or dismiss, as the one course or the other may be appropriate, without considering that question. But it is equally well settled that the failure of the state court to pass on the Federal right or immunity specially set up, of record, is not conclusive, but this court will decide the Federal question if the necessary effect of the judgment is to deny a Federal right or immunity specially set up or claimed, and which, if recognized and enforced, would require a judgment different from one resting upon some ground of local or general law."

II.

The Court, under the guise of a finding of constructive fraud, decided issues of public as well as private concern, over which the Communications Commission was vested by Congress with primary jurisdiction.

(a) **The issues decided were of public as well as private concern.** The decision below (R. 745) purported to be based on the following general conclusions:

(1) That the lease and assignment were not "a good deal for the Society";

(2) That the Society's president "because of his close friendship for Gillin" (the radio station manager who was admittedly responsible for its success) prompted the organization of the assignee corporation by Gillin and other friends;

(3) That "Gillin obtained a one-fourth interest in this 15-year lease * * * for a nominal investment

and in addition thereto, in effect, a $25,000 bonus * * *."

(4) The Society in return "obtained an extremely excessive reduction in its income * * * and a lease the terms of which are grossly inadequate to protect it * * *."

(5) That there was "little security" back of the lease and assignment because of the capital stock structure of the assignee corporation.

These conclusions, we submit, involved judgments on issues in which the public as well as the assignor and assignee were interested and over which the Federal Communications Commission had primary jurisdiction under Section 310 (b) of the Act. That section provides:

> "The station license required hereby, the frequencies authorized to be used by the licensee, and the rights therein granted *shall not be transferred, assigned, or in any manner* either voluntarily or involuntarily *disposed of*, or indirectly by transfer of control of any corporation holding such license, to any person, *unless the Commission shall, after securing full information, decide that said transfer is in the public interest*, and shall give its consent in writing." (Italics ours.)

Under this section the Federal Communications Commission had a paramount concern, from the standpoint of the public interest, in the very financial and managerial arrangements found inadequate by the Nebraska Supreme Court, solely from the standpoint of supposed private rights.[6]

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6 47 U. S. C. A., Sec. 308 (b); *In Re The Traveler's Broadcasting Service Corp.*, 7 F. C. C. 504.

In *Heitmeyer v. Fed. Com. Com.*, 95 Fed. (2d) 91, the Court said:

> "In any event, the burden is and should be upon the applicant to satisfy the Commission, not only that he has financial ability to construct and operate a station, but financial ability to construct and operate it free of control, direct or indirect, by any person within the classes proscribed by the statute."

Thus, the amount of rental payable by the assignee, Gillin's selection as its president and manager, the capital structure and assets of the assignee, and Gillin's stock interest therein, were all required to be set forth in the application filed with the Commission (supra, p. 7), together with a copy of the lease agreement; and the consent of the Commission to the assignment of the license was explicitly based "on the statements contained in, or made in connection with, the application" and on the further basis "that the undertakings of the parties upon which this assignment is authorized will be carried out in good faith" (R. 662A).

There were no detailed findings, but it may be assumed that weight was given by the Commission to Gillin's continued management of the station, the rental figure included in the lease and the fact that ownership was being transferred from an insurance society, with interests in another field, to a corporation exclusively concerned with the broadcasting business. That these factors were considered by the Commission is a fair inference

from its prior decisions[7] and is certainly consistent with the scope of its recent general regulations.[8]

(b) **The primary jurisdiction doctrine applies to the Federal Communications Commission.** The primary jurisdiction doctrine, heretofore applied to functions of the Interstate Commerce Commission in the field of railroad rates,[9] and pipe line joint rate divisions,[10] the United States Shipping Board in the field of ocean rates,[11] and the Civil Aeronautics Board in the field of airplane flight regulations,[12] would seem equally applicable to the func-

7. *In the Matter of The WGAR Broadcasting Co.* (WGAR) 4 F. C. C. 540, 549 (transfer of control disapproved where the Commission found, "that no direct public benefit will result in the granting of the application, but that the stockholders will benefit privately from the financial arrangements"); *In the Matter of Bishop, Transferor, and Roosevelt, Transferee*, (KFJZ) 5 F. C. C. 301, 304 (transfer of control approved upon a finding that "the program service of Station KFJZ, as well as its technical operation, will be materially improved, thus raising its general standard of efficiency"); *In the Matter of Beverly Hills Broadcasting Corp.* (KMPC) 4 F. C. C. 250, 253, where a transfer was approved because of the experience of the transferee who was found peculiarly "qualified to own and operate a broadcast station" so that "a better public service will result therefrom"; *In the Matter of Lancaster Broadcasting Service, Inc.*, (WKJC) 2 F. C. C. 164 (transfer approved because it would result in a sounder financial position for the station); *In the Matter of Harold F. Gross*, (WJIM), *Assignor*, 6 F. C. C. 333, 335 (transfer approved because it would "eliminate a liability against the station"); *In the Matter of John P. Scripps, Assignor*, (KHUB) 9 F. C. C. 206, 207 (Assignment of License held in public interest where made by "one who owns both the daily newspapers in the community to one who has no newspaper interests in that city"); *In the Matter of Edward H. Butler, et al, Transferors*, 9 F. C. C. 141, 142 (transfer of control from one newspaper to another approved where it "would alleviate the concentration of control by the News over facilities for public expression and the moulding of public opinion in the community").

8 Cf. Chain Broadcasting Regulations, F. C. C. Regs. 3.101, et seq; *National Broadcasting Co. v. United States*, 319 U. S. 190, 87 L. Ed 1344, 63 S. Ct. 997.

9 *Armour & Co. v. Alton RR. Co.*, 312 U. S. 195, 85 L. Ed. 771, 61 S. Ct. 498; *Gen. Am. Tank Car Corp. v. El Dorado Terminal Co.*, 308 U. S. 422, 84 L. Ed. 361, 60 S. Ct. 325.

10 *Marony et al v. Applegate et al*, 266 App. Div. 412, 42 N. Y. Supp. (2d) 768.

11 *United States Navigation Co. v. Cunard Steamship Co.*, 284 U. S. 474, 76 L. Ed. 408, 52 S. Ct. 247.

12 *Adler v. Chicago & Southern Airline, Inc.*, 41 F. Supp. 366.

tions vested in the Communications Commission under the Communications Act of 1934. Indeed, the doctrine seems especially applicable, since the Communications Act gave the Commission "not niggardly but expansive powers" in a field "the dominant characteristic of which was the rapid pace of its unfolding" and a need for special vigilance to "encourage the larger and more effective use of radio in the public interest."[13]

If the doctrine of primary jurisdiction extends to the Federal Communications Commission, it is clearly applicable to a representative suit such as the case at bar. A closely analogous case is the recent decision in *Marony et al v. Applegate et al*, 266 App. Div. 412, 42 N. Y. S. (2d) 768. A minority stockholder there sued the directors of a corporation for damages for constructive fraud based on allegedly unfair divisions of joint rates by the corporation and other pipe line carriers. The bill was dismissed until the Interstate Commerce Commission could first determine the preliminary question of what division of rates would be fair and reasonable.

Applying the doctrine here, we submit that it was the function and duty of the Federal Communications Commission to pass on the desirability, in the public interest, of the very elements of the lease and assignment condemned by the Nebraska Supreme Court as contrary to the private interests of the lessor.

(c) **Respondent had an adequate remedy before the Communications Commission and the United States**

13 *National Broadcasting Co. v. United States*, 319 U. S. 190, 219, 87 L. Ed. 1344, 63 S. Ct. 997.

Courts. Respondent's remedy was to intervene[14] before the Federal Communications Commission, and if dissatisfied with its ruling, institute an action before a special three-judge federal court in Nebraska under Section 402(a) of the Act.[15]

In *Federal Communications Commission v Columbia Broadcasting System of California*, 311 U. S 132, 85 L. Ed. 87, 61 S. Ct. 152, in considering the remedy for review of orders relating to the assignment or transfer of radio station licenses, this Court said:

> "Insofar as action of the Federal Communications Commission is subject to judicial review, the Act bifurcates access to the lower federal courts according to the nature of the subject matter before the Commission. Barring the exceptions immediately to be noted, Sec. 402 (a) assimilates 'suits to enforce, enjoin, set aside, annul, or suspend any order of the Commission under this Act' to the scheme of the Act of October 22, 1913 (38 Stat. at L. 208, 219, Chap. 32), pertaining to judicial review of orders of the Interstate Commerce Commission. Therefore as to the general class of orders dealt with by Sec. 402 (a) jurisdiction rests exclusively in the appropriate district court, specially constituted, with direct appeal to this Court."

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14 Rules & Regs., F. C. C., Sec. 134, and see decision of July 5, 1944, in which a minority stockholder of a proposed assignor was held entitled by the Commission *en banc* to intervene in proceedings for consent to a license assignment. (*In the Matter of the Application of Arde Bulova, et al, for Consent to Transfer Control of Wodam Corporation* (WOV), Docket No. 6598, Petition for Leave to Intervene by Richard E. O'Day.)

15 47 U. S. C. A., Sec. 402 (a); *Federal Communications Commission v. Columbia Broadcasting System of Cal.*, 311 U. S. 132, 85 L. Ed. 87, 61 S. Ct. 152; *Monocacy Broadcasting Co. v. Prall et al* 90 Fed. (2d) 421.

III.

The order of the Commission could not be challenged except in the United States District Courts pursuant to Section 402 (a) of the Communications Act.

For the reasons discussed above, we submit that the court below had no jurisdiction, the suit being, in effect, one to set aside an order of the Federal Communications Commission.

(a) **A radio station license is not a mere incident to the facilities of a radio station.** In its opinion filed May 26, 1944, adhering to the judgment of March 10, 1944 (R. 794), the Supreme Court of Nebraska stated that:

> "The fact that the property involved was used in a licensed business was an incident to the suit only."

This conclusion is plainly erroneous. It is the radio station with its physical equipment which is licensed. The wave length is merely assigned by the Federal Communications Commission to the radio station. Where public interest, convenience or necessity will not be served, the Federal Communications Commission can not only refuse to issue a license but can refuse to permit the construction of the station, because jurisdiction over the station, its transmitter, its aerials and other instrumentalities and facilities, and the license to operate, all vest exclusively in the Federal Communications Commission. The physical property used in the operation of the station and the license for operation are, both in fact and theory, inseparable.[16]

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[16] 47 U. S. C. A., Sec. 319; *Whitehurst v. Grimes*, 21 Fed. (2d) 787; *Fisher's Blend Station, Inc. v. Tax Comm. of the State of Wash.*, 297 U. S. 650, 80 L. Ed. 956, 56 S. Ct. 608.

Likewise, any contention that the Commission lacks jurisdiction over the physical facilities of a radio broadcasting station is unrealistic and unsound. The mere presence of these facilities within its geographical bounds cannot confer upon a state control over the facilities inconsistent with the paramount control of the Federal Communications Commission. So long as they are constituent parts of an operating radio broadcasting station they are subject to the provisions of the Communications Act of 1934, as amended, and to the jurisdiction of the Commission. (See Communications Act of 1934, Secs. 301, 303(c), and 303(q); Rules and Regulations, Secs. 3.41 to 3.64. See also Standards of Good Engineering Practice, pp. 36-76, inclusive.) To the extent that it constitutes an integral part of an existing radio station—whether it be a transmitter, antenna towers, studio equipment, etc.—its operation and use is subject to the rules and regulations of the Communications Commission, and permission must be obtained from that body to effect any change, whether in location or construction, which will in any way affect the operation of that station.

Typical of the many instances wherein authority over the physical property of a radio station is vested in the Federal Communications Commission are the following:

(1) Installation of new transmitting equipment,

(2) changes in location of existing transmitting equipment,

(3) changes in construction of existing transmitting equipment,

(4) installations of new antenna systems,

(5) changes in location of existing antenna systems,

(6) changes in construction of existing antenna systems,

(7) changes in location of main studios of stations,

(8) changes in types of tubes used in existing transmitter,

(9) changes in frequency control equipment and substitution of new crystals to effect changes in operating frequencies,

(10) changes in painting and illumination of antenna towers,

(11) operation with increased or reduced power.

Each of the foregoing instances illustrates the degree and extent to which the Commission has and exercises control and authority over the physical properties of radio broadcasting stations.

In *Federal Communications Commission v. Sanders Bros. Radio Station*, 309 U. S. 470, 84 L. Ed. 869, 60 S. Ct. 693, this Court, in considering an application for permission to move a radio transmitter and studios to a new locale, said:

> "We took this case to resolve important issues of substance and procedure arising under the Communications Act of 1934, as amended. * * * Unless Congress had exercised its power over interstate commerce to bring about allocation of available frequencies and to regulate the employment of transmission equipment the result would have been an impairment of the effective use of these facilities by anyone. The fundamental purpose of Congress in respect of broadcasting was the allocation and regulation of the use of radio frequencies by prohibiting such use except under license."

(b) **It is immaterial that the order of the Commission was permissive and not mandatory.** From a jurisdic-

tional standpoint, it was no less an interference with the jurisdiction of the Commission for the court to prevent the assignee from operating the station than it would have been for the court to direct the assignor to resume operations. The decree nullified the order of the Commission by taking away from the license assigneee the very facilities which it was licensed to operate and cancelling the very lease arrangements on the basis of which the license was issued. In *Venner v. Michigan Central R. R. Co.*, 271 U. S. 127, 70 L. Ed. 868, 46 S. Ct. 444, the Interstate Commerce Commission had issued a permissive order authorizing a railroad company to enter into joint arrangements for the purchase of locomotives. A minority stockholder filed suit in the state courts of Ohio to enjoin the railroad from carrying out these arrangements. In holding that such suit invaded the exclusive jurisdiction of the Commission, the court said:

> "We agree with the court below that the suit is essentially one to annul or set aside the order of the Commission. *While the amended bill does not expressly pray that the order be annulled or set aside, it does assail the validity of the order and pray that the defendant company be enjoined from doing what the order specifically authorizes, which is equivalent to asking that the order be adjudged invalid and set aside.* Lambert Run Coal Co. v. Baltimore & Ohio R. R. Co., 258 U. S. 377, 380, 382, 66 L. Ed. 671, 674, 675, 42 S. Ct. 349. Such a suit must be brought against the United States as the representative of the public and may be brought only in a Federal district court. Judicial Code, secs. 208, 211; Act of October 22, 1913, c. 32, 38 Stat. 219; Illinois Central R. R. Co. v. State Public Utilities Commission, 245 U. S. 493, 504-505, 62 L. Ed. 425, 436, 437, P. U. R. 1918C, 279, 38 S. Ct. 170; North Dakota v. Chicago & Northwestern Ry. Co. et al, 257 U. S. 485, 487, 66 L.

Ed. 329, 42 S. Ct. 170; Texas v. Interstate Commerce Commission, 258 U. S. 158, 164, 66 L. Ed. 531, 537, 42 S. Ct. 261; Lambert Run Coal Co. v. Baltimore & Ohio R. R. Co., supra. *That the order is not mandatory, but permissive, makes no difference in this regard.* Chicago Junction case (Baltimore & O. R. Co. v. United States), 264 U. S. 258, 263, 68 L. Ed. 667, 673, 44 S. Ct. 317. And as the State Court was without jurisdiction the Federal Court acquired none by the removal. Lambert Run Coal Co. v. Baltimore & O. R. Co., supra."[17] (Italics ours.)

(c) **The decision below can not be sustained as involving purely "non-federal" questions.** The court below, although it finds "constructive fraud," actually decided in petitioners' favor on every purely non-federal ground for challenging the validity of the lease. The court below agreed (1) that the board of directors had the power and authority to enter into and authorize the execution of the lease; (2) that no officer or director of the Society had any interest in the assignee corporation; (3) that there was no actual fraud on the part of any officer or director of the Society; and (4) that even as to "constructive fraud" only the officers and directors of the Society, and not the assignee corporation, were chargeable therewith (R. 745). It is impossible, therefore, to explain the decision below as involving a purely private controversy over questions of state law. *Despite the misleading verbiage of "constructive fraud" the decision below was plainly based on financial and managerial aspects of the station lease and assignment of license within the primary jurisdiction of the Federal Communications Commission and upon which the Commission acted.*

17 For later cases on the same point see *So. Pac. Co. v. City of Willow Glen*, 49 Fed. (2d) 1005, 1007.

(d) **Even in cases of actual fraud, the Federal Communications Commission must decide whether license cancellation is in the public interest.** As set forth above, both courts below found no actual fraud, and only a bare majority of the Supreme Court of Nebraska found so-called "constructive fraud." However, even if actual fraud could have been proven, it was still within the province of the Communications Commission to decide that the public interest would not be served by setting aside the transfer. Thus, In the Matter of the Revocation of License of the Panama City Broadcasting Co. (WDLP) 9 F. C. C. 208, a radio license had been obtained through deliberate fraud and deceit upon the Communications Commission by agents of the real party in interest. It was conceded that the deception was deliberate and inexcusable, and for this reason a minority of the Commission was of the view that the license should be revoked. A majority of the Commission, however, held that notwithstanding the fraud, the public interest would not be served by revoking the license. The Commission said (pp. 218, 219):

> "Having decided that Mr. Perry is not personally disqualified by the culpable conduct of his agents, we must next determine whether he has affirmatively demonstrated his fitness to continue to be the controlling stockholder in the respondent corporation.
>
> "His record of business achievement, his public spirited interest in civic and political affairs * * * all speak on his behalf. But the most important criterion is the public service being rendered by the station * * *.
>
> "We note in passing certain special circumstances applicable to this licensee arising out of the

war in which this Nation is now engaged. It is most important in war times to preserve the radio as a means of communicating with the public. It is unnecessary to mention all of the numerous services which radio performs in getting war-important messages to the public * * *. Also, by reason of the war, there is a severe shortage of materials with which to construct new stations or increase the coverage of existing ones. If we were to sustain the order of revocation against Panama City Broadcasting Co., the people of Panama City and Lynn Haven would certainly for a time be deprived of the wartime service which they now receive from station WDLP * * *. The loss could be remedied only after a considerable lapse of time and then only if satisfactory parties should apply for authority to supply service to the community and obtain the necessary equipment.

"The Commission thus concludes that public interest will be served by permitting Panama City Broadcasting Co. to continue as licensee of Station WDLP, with Mr. Perry as controlling stockholder (either directly or through controlled corporations), and that public interest will not be served by revoking the respondent's license."

IV.

The decision is contrary to decisions of this Court in attributing valuable property interests to a radio station license.

As a correlative to the primary jurisdiction considerations, it is significant that the decision below was based largely on a finding of inadequacy of consideration which, of necessity, must have attached to the Society's station license a substantial and valuable property interest. Otherwise, it is difficult to understand a finding

of gross inadequacy in an annual rental of $74,000 for a term of fifteen years for physical properties originally costing $175,000, which in turn had been considerably depreciated. It is apparent that, by thus attaching a substantial and valuable property right to the station license, the Nebraska court violated the provisions of Sections 301 and 309 (b) of the Act. As this court said in *Federal Communications Commission v. Sanders Bros. Radio Station*, 309 U. S. 470, 84 L. Ed. 869, 60 S. Ct. 693:

> "The policy of the Act is clear that no person is to have anything in the nature of a property right as a result of the granting of a license."

V.

The case is of vital public importance.

To the public and to the Federal Communications Commission, representing the public interest, the decision below, if allowed to stand, presents the following dilemma:

The Insurance Society is given back all of the apparatus and physical equipment for Radio Station WOW, but without any license to operate it. Radio Station WOW, Inc. is left with a license to broadcast, but with no apparatus or physical equipment and with no way of obtaining new equipment for the duration of the war.

The Supreme Court of Nebraska did not concern itself with the solution or seriousness of this problem. In its second opinion (R. 794, 797), it said:

> "* * * It is true that the Federal Communications Commission may refuse to approve the reissuance of a license to the Woodmen of the World Life

Insurance Society. That is a hazard that every radio station operator must take. It is a matter that does not concern this court and is not involved in the decision of the case now before us. * * *"

The Federal Communications Commission will be forced now either to submit to the judgment of the Supreme Court of Nebraska (regardless of its prior decision and its opinion on the desirability of further operations by the Society), or deprive the people of the Middle West of the facilities of one of its major broadcasting stations. This, we submit, is a direct and flagrant interference with the jurisdiction and discretion of the Federal Communications Commission.

CONCLUSION

It is therefore respectfully submitted that the Writ of Certiorari should be granted and that the judgments of the Supreme Court of Nebraska should be reversed.

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Dated: October 11, 1944.

APPENDIX A.

Applicable sections of the Communications Act of 1934 (Chap. 5, Title 47, USCA) not quoted in the petition or brief:

"Sec. 152 (a) The provisions of this Chapter shall apply to all interstate and foreign communication by wire or radio and all interstate and foreign transmission of energy by radio, which originates and/or is received within the United States, and to all persons engaged within the United States in such communication or such transmission of energy by radio, and to the licensing and regulating of all radio stations as hereinafter provided; * * *."

"Sec. 153 (b) 'Radio communication' or 'communication by radio' means the transmission by radio of writing, signs, signals, pictures, and sounds of all kinds, including all instrumentalities, facilities, apparatus, and service (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission."

"(d) 'Transmission of energy by radio' or 'radio transmission of energy' includes both such transmission and all instrumentalities, facilities, and services incidental to such transmission."

"(k) 'Radio station' or 'station' means a station equipped to engage in radio communication or radio transmission of energy."

"Sec. 301. It is the purpose of this chapter, among other things, to maintain the control of the United States over all the channels of interstate and foreign radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license. No

person shall use or operate any apparatus for the transmission of energy or communications or signals by radio * * * except under and in accordance with this chapter and with a license in that behalf granted under the provisions of this chapter."

"Sec. 303. Except as otherwise provided in this chapter, the Commission from time to time, as public convenience, interest, or necessity requires, shall—

"(c) Assign bands of frequencies to the various classes of stations, and assign frequencies for each individual station and determine the power which each station shall use and the time during which it may operate;

"(e) Regulate the kind of apparatus to be used with respect to its external effects and the purity and sharpness of the emissions from each station and from the apparatus therein;"

"Sec. 304. No station license shall be granted by the Commission until the applicant therefor shall have signed a waiver of any claim to the use of any particular frequency or of the ether as against the regulatory power of the United States because of the previous use of the same, whether by license or otherwise."

"Sec. 308 (a) The Commission may grant licenses, renewal of licenses, and modification of licenses only upon written application therefor received by it: * * *.

"(b) All such applications shall set forth such facts as the Commission by regulation may prescribe as to the citizenship, character, and financial, technical, and other qualifications of the applicant to operate the station; * * *."

"Sec. 309 (a) If upon examination of any application for a station license or for the renewal or modification of a station license the Commission shall determine that public interest, convenience, or neces-

sity would be served by the granting thereof, it shall authorize the issuance, renewal, or modification thereof in accordance with said finding."

"(b) (2) Neither the license nor the right granted thereunder shall be assigned or otherwise transferred in violation of this chapter."